

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JERRY D. SCHARF,
Plaintiff,

v.

JO ANNE B. BARNHART,
Commissioner of Social
Security,
Defendant.

NO. CV-04-0222-LRS

**ORDER DENYING PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT AND
GRANTING DEFENDANT'S CROSS-
MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION

The plaintiff, Jerry D. Scharf, moves the court for summary judgment and the defendant has submitted a cross-motion for summary judgment. Because the court finds the Administrative Law Judge ("ALJ") properly analyzed in his written decision the plaintiff's allegations of mental and physical impairments, properly accorded appropriate weight to medical evidence and medical experts, and properly applied the correct legal analysis to the disability determination, the court denies the plaintiff's motion and grants the defendant's cross-motion.

BACKGROUND

Plaintiff protectively filed an application for Title XVI Supplemental Security Income (SSI) disability benefits and an

1 application for disability insurance benefits on October 26, 2001
2 (Tr. 69) alleging an onset date of June 1, 2000 (Tr. 70, 297).
3 Benefits were denied initially and upon reconsideration. A request
4 for a hearing was timely filed (Tr. 49).

5 On May 8, 2003, a hearing was held (Tr. 308-334). Testimony
6 was taken from plaintiff, who was represented by an attorney; Jay M.
7 Toews, Ed.D., a medical expert; Kenneth D. Sawyer, M.D., a medical
8 expert; and Dennis Dexter, a vocational expert.

9 Born in 1954, the plaintiff was 49 years old at the time the
10 ALJ issued his decision (Tr. 29). Plaintiff has an eighth grade
11 education (Tr. 21). His prior work experience was as a cook,
12 described as medium physical demand, SVP 7; and logistical support
13 for forest firefighters (Tr. 124), estimated by a disability
14 adjudicator to be of medium physical demand, SVP 7¹.

15 At the hearing, plaintiff testified that he had been receiving
16 counseling for depression, once per month. Id. He testified that
17 he continued to go because they kept telling him to come back,
18 although he stopped going about a week before the hearing. Id. He
19 testified that he currently experienced problems with back pain once
20 per week, with severe pain a couple of times per month, going down
21 his legs. Id. To relieve this severe pain, he gets into a position
22 to relieve the pain and takes narcotic pain medication. Id. He
23 testified that he takes narcotic pain medication 14-15 days per
24 month.

25 The plaintiff stated that he continues to have anxiety attacks
26 that interrupt his sleep a few times a month, although sometimes he

27
28 ¹The vocation expert, Mr. Dexter, did not have enough
information for which to testify regarding the physical demands or
the skill level (Tr. 329).

1 would go a couple of months without one. Id. The plaintiff is 6'
2 and weighs 325 pounds (Tr. 27). His doctor has told him to lose
3 weight. Id. He testified that he becomes short of breath with
4 activities such as walking and stair climbing, and estimated he
5 could walk 2 blocks on a good day. Id. He testified that since
6 about June 1, 2000, he has had difficulty being able to hold down a
7 job because "jobs won't allow me to take as much time off as I was
8 having to." (Tr. 330).

9 The plaintiff alleges disability as of June 1, 2000 based on a
10 variety of musculoskeletal and psychological impairments. These
11 include bad knees, neck, hips, and mental health problems (Tr. 21).
12 The ALJ found, in an eleven-page written decision, that plaintiff
13 was not disabled within the meaning of the Social Security Act (Tr.
14 21). The ALJ found that plaintiff had the residual functional
15 capacity to perform sedentary work (Tr. 30, Finding 7). The ALJ
16 also found that: plaintiff could occasionally engage in overhead
17 lifting; he is able to learn and carry out complex instructions; his
18 anxiety would episodically interfere with his concentration, work
19 attendance and pace; and he would do best with a firm but
20 nonaggressive supervisor (Tr. 30, Finding 7). The ALJ's decision
21 became the final decision of the Commissioner when the Appeals
22 Council declined to review the decision on June 14, 2004 (Tr. 5-8).
23 The plaintiff then commenced this action.

24 DISCUSSION

25 The plaintiff raises two issues on appeal. First, the
26 plaintiff argues that the ALJ's written decision is not supported by
27 substantial evidence. Second, the plaintiff alleges the ALJ did not
28 apply the proper legal standard. And more specifically, the

1 plaintiff argues:

2 What makes this case troubling is we have an on
3 record decision by Judge Hood favorable to the
4 plaintiff followed by a written decision that
 is a complete repudiation of that on the record
 decision and without explanation of the change.

5 Ct. Rec. 10 at 4.

6 **A. Review of Commissioner's Decision**

7 A district court must uphold the [Commissioner's] determination
8 if the factual findings are supported by substantial evidence and
9 the [Commissioner] applied the proper legal standards. *Curry v.*
10 *Sullivan*, 925 F.2d 1127, 1129 (9th Cir.1990). "Substantial evidence"
11 means more than a "mere scintilla" of evidence, but "less than a
12 preponderance." *Young v. Sullivan*, 911 F.2d 180, 183 (9th
13 Cir.1990). If the ALJ applies the wrong legal standard, the ALJ's
14 decision must be set aside even though the findings are supported by
15 substantial evidence. *Browner v. Secretary of Health and Human*
16 *Services*, 839 F.2d 432, 433 (9th Cir. 1987).

17 **B. The ALJ Properly Evaluated Available Medical Evidence**

18 The plaintiff argues that he meets or equals the listing for
19 1.04A. Ct. Rec. 10 at 10. Plaintiff asserts that the ALJ
20 concluded, at the time of the hearing, that plaintiff did meet 1.04A
21 and even requested that counsel write a decision for the ALJ so
22 stating. *Id.* Specifically, plaintiff alleges, at the hearing the
23 ALJ concluded that the plaintiff meets Listing 1.02 for weight
24 bearing joint, in part because of the significant meniscal tear and
25 in part because of the impact of his obesity upon the joint. *Id.* At
26 11. But in the written decision, plaintiff states, there was no
27 explanation by the ALJ as to why he changed his mind. Plaintiff
28 concludes that the change in the decision is not based upon

1 substantial evidence. *Id.*

2 **1. Physical Impairments--Both Dr. Sawyer's Opinion and**
3 **Dr. Jensen's Opinion Were Accorded Proper Weight**

4 Plaintiff argues that plaintiff meets or equals the listing for
5 1.04A. Defendant responds that Kenneth D. Sawyer, M.D., a medical
6 expert, testified that plaintiff's physical condition did not meet
7 or equal a listed impairment (Tr. 323).

8 Defendant further explains that upon questioning by plaintiff's
9 counsel regarding neurological symptoms that wax and wane, Dr.
10 Sawyer maintained that plaintiff did not meet or equal the listing
11 (Tr. 325-27). More specifically, Dr. Sawyer testified that,
12 "Basically he would be closer to equaling or meeting the listing
13 than he would be if he never had any neurologic [INAUDIBLE]" (Tr.
14 327). Defendant argues that "closer to" does not equate to having
15 met the listing. Ct. Rec. 13 at 10. The undersigned judicial
16 officer agrees.

17 Dr. Sawyer, a non-examining, non-treating doctor testified that
18 plaintiff had the residual functional capacity (RFC) for sedentary
19 exertion (Tr. 30). Dr. Jensen, an examining and treating doctor,
20 opined that plaintiff had severe limitations in keeping with a
21 sedentary exertion level. Dr. Jensen further opined it was
22 reasonable to anticipate exacerbations of pain that would interfere
23 with the ability to report to work on a regular and continuous basis
24 (Tr. 28).

25 The ALJ noted Dr. Jensen's opinion but rejected portions of his
26 opinion as "not keeping with the record as a whole, and objective
27 evidence does not support such limitations" (Tr. 28). The ALJ
28 further noted that Dr. Jensen's subsequent Physical Disability
Evaluation "is not in keeping with his own records" (Tr. 28). The

1 ALJ noted with particularity that:

2 No mention was made of ongoing pain or
3 limitations as a result of chronic pain, and in
4 fact, one month earlier, his chronic pains were
5 noted to be well managed on Vicodan. His
6 musculoskeletal problems were felt to
7 exacerbate his depression, however, it was
8 noted that his depression had resolved by July
9 2002 (Tr. 28).

10 An ALJ may reject the testimony of an examining, but non-
11 treating physician, in favor of a nonexamining, nontreating
12 physician when he gives specific, legitimate reasons for doing so,
13 and those reasons are supported by substantial record evidence.
14 *Andrews v. Shalala*, 53 F.3d 1035, 1043 (9th Cir. 1995).

15 The ALJ's justification for adopting the medical expert's
16 testimony (Dr. Sawyer) over some of the examining nontreating
17 doctor's opinion, i.e., limitations testimony, was specific,
18 legitimate and supported by substantial record evidence. The
19 undersigned concludes that the ALJ met his burden in this regard.

20 **C. Plaintiff's Allegations of Disabling Mental Impairments,
21 Symptoms, Pain, and Limitations--Properly Discounted In
22 View Of Credibility Determination and Rejection of the
23 Contradicted Opinion of Dr. Sutherland**

24 Plaintiff complains that the limitations assessed by Stephen
25 Sutherland, Ph.D.² should have been given more weight. Ct. Rec. 10
26 at 11. Defendant responds that the ALJ properly noted that "while
27 Dr. Sutherland assessed significant limitations³, no objective
28

29 ²Dr. Sutherland had conducted two independent evaluations of
30 Mr. Scharf at the request of the Department of Social and Health
31 Services (Tr. 16).

32 ³Dr. Sutherland's findings are set forth at Tr. 164-71. Dr.
33 Sutherland noted that plaintiff was chronically mentally ill and
34 had a number of marked and moderate to marked limitations in his
35 ability to function. Id. He noted that plaintiff had limitations
36 at the marked level which is noted to be defined as having a "very
37 significant interference with basic work-related activities" in

1 testing had been done that he could see, and no test scores are
2 contained in the record" (Tr. 26). Ct. Rec. 13 at 8.

3 It is true that Dr. Sutherland wrote on the evaluation that his
4 ratings were "based on observations, history and testing" (Tr. 166).
5 But the only indication of any test given was his reference to "PAI"
6 (Personality Assessment Inventory) under "plan of care/prognosis,"
7 item 7, indicating that an assessment was done on September 20, 2000
8 (Tr. 167). Upon Dr. Sutherland's re-examination of plaintiff on
9 June 5, 2001, he wrote that "Incomplete on Personality Assessment
10 Inventory because he [Mr. Scharf] had to go because of ride
11 problems" (Tr. 26, 171). Other than that reference to an
12 uncompleted PAI, there are no other references to any testing done,
13 except Dr. Sutherland's writing that "Ratings based on the history,
14 behavioral observations and test finding" (Tr. 170).

15 The ALJ relied on Dr. Toews' testimony to arrive at his
16 conclusion that objective evidence did not support Dr. Sutherland's
17 report (Tr. 26). Dr. Toews is a non-examining, non-treating medical
18 expert (Tr. 16). Dr. Toews testified that, "I don't see any-where
19 are no scores other than the mental-mini-mental status exam, which
20 indicates that the individual is cognitively intact, would not
21 appear to be any attention or memory problems or difficulty
22 following simple instructions and so on" (Tr. 318). Dr. Toews
23 further testified that "at least by June of '02, the medical doctor
24 reported that depression was resolved" (Tr. 318).

25 Defendant urges that although Dr. Sutherland may have said that
26

27 terms of his ability to relate appropriately to co-workers and
28 supervisors, interact appropriately with public contacts, and his
ability to respond appropriately to and tolerate the pressures and
expectations of normal work setting (Tr. 164-166).

1 his ratings were based on testing, there were no test scores for
2 independent evaluation by a medical expert. Ct. Rec. 13 at 8.
3 Defendant contends, and the ALJ noted in his decision, there was no
4 objective evidence to support the ratings of Dr. Sutherland and his
5 ratings were not consistent with the record as a whole (Tr. 26; Ct.
6 Rec. 13 at 8).

7 The opinion of an examining doctor, such as Dr. Sutherland, can
8 only be rejected for specific and legitimate reasons that are
9 supported by substantial evidence in the record. *Andrews v. Shalala*,
10 53 F.3d 1035, 1043 (9th Cir.1995). The ALJ noted that no test
11 scores from Dr. Sutherland's assessment were contained in the record
12 (Tr. 26). Additionally, the ALJ explained that Dr. Sutherland's
13 assessments pre-dated the opinion of plaintiff's treating physician
14 Joe Jensen, M.D., who reported in July 2002 that plaintiff's
15 depression was resolved (Tr. 24, 291).

16 The ALJ gave further specific and legitimate reasons for
17 rejecting Dr. Sutherland's opinion. He noted in his decision that:

18 Mental health records show a seasonal pattern
19 to his mental impairment, with moderate
20 symptoms that come and go. Dr. Toews testified
21 that he would have only mild impairments due to
22 anxiety. Counseling records reported that he
23 is intelligent, fully functional, able to
24 follow simple instructions, complete all his
25 activities of daily living, solve easy dilemmas
26 independently, adapt to mild changes in the
27 environment, use sufficient social skills to
28 interact with others appropriately, demonstrate
sustained concentration, and had good insight.
The record indicates he has some problems with
authority (Tr. 28).

Moreover, defendant points out that plaintiff testified that he
stopped going to the mental health clinic the week before the
hearing because "[t]hey suggested I really didn't need counseling"
(Tr. 328).

1 After "careful review and consideration of all the evidence,"
2 the ALJ also found the plaintiff "to be less than fully credible"
3 (Tr. 27). The ALJ noted in his decisions several examples of
4 inconsistencies leading the ALJ to conclude that plaintiff's
5 subjective complaints regarding the extent of his functional
6 limitations were not completely credible (Tr. 27). The ALJ properly
7 discredited the plaintiff's testimony of his alleged disabling
8 mental impairments, symptoms, and limitations to the extent
9 appropriate. The ALJ's decision contained a reasoned evaluation of
10 plaintiff's credibility (Tr. 27). Because the ALJ set forth
11 specific, legitimate reasons for giving less than full weight to
12 plaintiff's testimony, the undersigned finds substantial evidence
13 supporting the determination that plaintiff did not suffer from a
14 severe mental impairment.

15 **D. The ALJ Properly Determined That Plaintiff Had The RFC To**
16 **Perform Sedentary Work**

17 The ALJ found that plaintiff has the residual functional
18 capacity for sedentary exertion with the additional non-exertional
19 limitation of occasional reaching overhead (Tr. 30).

20 The plaintiff asserts that the vocational expert was not
21 helpful to the defendant in this case "because Mr. Dexter offered no
22 opinion that Mr. Scharf is capable of substantial gainful activity."
23 Ct. Rec. 10 at 15.

24 In some cases, it is appropriate for the ALJ to rely on the
25 Medical-Vocational Guidelines ("Guidelines") to determine whether a
26 claimant can perform some work that exists in "significant numbers"
27 in the national economy. *Tackett v. Apfel*, 180 F.3d 1094 (9th Cir.
28 1999). The Guidelines present, in table form, a short-hand method
for determining the availability and numbers of suitable jobs for a

1 claimant. The Secretary of Health and Human Resources promulgated
2 these Guidelines in 1978 in order to improve the efficiency and
3 uniformity of Social Security disability benefits determinations.
4 *Desrosiers v. Secretary of Health and Human Servs .*, 846 F.2d 573,
5 576 (9th Cir. 1988).

6 As explained in *Desrosiers*, significant nonexertional
7 impairments, such as poor vision, inability to tolerate dust or
8 gases, or pain may make reliance on the grids inappropriate. *Id.* at
9 577. The fact that a nonexertional⁴ limitation is alleged does not
10 automatically preclude application of the Guidelines. *Tackett*, 180
11 F.3d at 1102.

12 The ALJ should first determine if a claimant's nonexertional
13 limitations significantly limit the range of work permitted by his
14 exertional limitations. *Tackett*, 180 F.3d at 1102. The ALJ did
15 just that. He first determined that plaintiff's nonexertional
16 limitations did not significantly limit the range of work permitted
17 by his exertional limitations, as noted in his decision (Tr. 29).
18 The ALJ properly weighed conflicting evidence concerning the
19 plaintiff's present psychological and physical impairments. The ALJ
20 then properly applied the Guidelines to these factors, ensuring the
21 final determination was consistent with other similar cases and
22 expeditious.

23 The plaintiff challenges the sufficiency of the evidence
24 supporting the ALJ's assessment. The assertion of a nonexertional
25 impairment, however, as noted above, does not preclude use of the

27 ⁴Nonexertional limitations are certain mental, sensory or
28 skin impairments which result solely in postural and manipulative
limitations or environmental restrictions. Appendix 2, Section
200.00(e).

1 Guidelines where evidence thereof is insufficient to support such a
2 finding. Additionally, the plaintiff does not expressly dispute the
3 ALJ's use of the Guidelines.

4 The ALJ relied on the opinions of Dr. Sawyer and Dr. Toews that
5 plaintiff is capable of sedentary work despite his medical
6 impairments (Tr. 27-28). This finding that plaintiff was capable of
7 sedentary work with occasional reaching was based on credible
8 evidence of insignificant, non-exertional limitations, i.e., Dr.
9 Sawyer's recognition of plaintiff's combination of degenerative disk
10 disease and arthritis of his neck and back and left knee, and
11 obesity (Tr. 323). Credible evidence of significant non-exertional
12 limitations was absent, warranting the use of the Guidelines.

13 **E. ALJ's Change Subsequent to the Hearing**

14 Plaintiff appears to be most puzzled by and alleges error
15 based on an interchange between plaintiff's counsel and the ALJ at
16 the hearing. Plaintiff asked this court to treat the "oral findings"
17 recited in the transcript as inconsistent with the ALJ's later
18 written decision.

19 Based on the transcript of record (Tr.310-34) the following
20 dialog occurred at the close of the hearing:

21 ALJ: Okay. Counsel? I would request that you prepare for
22 me a proposed Decision which concludes that I find that he
meets the listing discussed by the doctor.

23 ATTY: 1.04A, Your Honor?

24 ALJ: Yes. Other than that, the doctor acknowledges that
25 these circumstances come and go, and are continuous
in that context.

26 ATTY: That meet or equal, Your Honor.

27 ALJ: I believe he meets, and he has [INAUDIBLE]
28 compounding disorders of occasional, depression, pain, and
anxiety. His condition is that he probably meets-what is
the weight-bearing joint in the listings? You got it?

1 ATTY: I have the listings here. Let me see what-

2 ALJ: Weight-bearing joint.

3 ATTY: I believe it it's 1.02.

4 ALJ: 1.--

5 ATTY: Yes, it is.

6 ALJ: Okay. All right. I believe he meets that listing as
7 well, in light of his-especially in light of his weight.
8 I would observe that he is significantly short of breath,
9 even at sedentary level, since the alleged onset. I think
 we'll wrap up there. If you want to put some more
 medical-I mean, more evidence in, you're certainly welcome
 to do so.

10 ATTY: Thank you, Your Honor.

11 Tr. 332-33.

12 The issue posed by plaintiff on the basis of this interchange
13 is whether the ALJ may or at least appear to verbally find claimant
14 to meet a listing during the hearing, and subsequent to the hearing
15 reject such finding. The answer to this question is
16 straightforward. The ALJ may change his mind after considering
17 additional evidence, reviewing the medical records, or just
18 reflecting before issuing his opinion. Nothing binds him to follow
19 his own dicta, stated in the course of a hearing, in his decision.
20 Plaintiff has cited no case law or rules to the contrary and the
21 court has been unable to find precedent supporting such a
22 contention.

23 To support his attack on the ALJ's determination that he
24 improperly changed his mind, plaintiff maintains that the ALJ did
25 not explain why he changed his mind after the hearing. It is the
26 undersigned judicial officer's opinion that the ALJ did spell out
27 the post-hearing finding in his eleven-page decision, which
28 inferentially explains his change of mind. The findings were

1 would have required the ALJ to abandon the grids, and possessed the
2 residual capacity to perform sedentary work with occasional overhead
3 reaching. The undersigned judicial officer finds that the ALJ's
4 findings were based on adequate documentation and careful appraisal.
5 Accordingly,

6 **IT IS HEREBY ORDERED:**

7 1. Plaintiff's Motion for Summary Judgment, **Ct. Rec. 9**, filed
8 on November 30, 2004 is **DENIED**.

9 2. Defendant's Cross-Motion for Summary Judgment, **Ct. Rec. 12**,
10 filed on January 6, 2005 is **GRANTED**.

11 **IT IS SO ORDERED.** The District Court Executive is directed to
12 enter this Order and an Order of Judgment and forward copies to
13 counsel.

14 **DATED** this 24th day of May, 2005.

15
16 *s/Lonny R. Suko*

17 _____
18 LONNY R. SUKO
19 United States District Judge
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